

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

Brian Melendez,

Complainant,

vs.

ORDER OF DISMISSAL IN PART;
NOTICE OF DETERMINATION OF
PRIMA FACIE VIOLATION;

Brian Worth, Rhonda Bentz, Noah Rouen,
Mike Murphy, Coalition for a Democratic
Workplace, and Vincent Curatola,

Respondents.

AND
NOTICE OF AND ORDER FOR
PROBABLE CAUSE HEARING

TO: Alan Weinblatt, Attorney at Law, Weinblatt & Gaylord, PLC, 111 East Kellogg Blvd, Suite 300, St. Paul, MN 55101 (for Complainant); Tony P. Trimble, Matthew W. Haapoja, and Amy S. Walstien, Trimble & Associates, Ltd., 10201 Wayzata Boulevard, Suite 130, Minneapolis, MN 55305 (for Respondent Noah Rouen); Neal T. Buethe, Briggs and Morgan, 2200 IDS Center, 80 South 8th Street, Minneapolis, MN 55402-2157 (for Respondent Coalition for a Democratic Workplace); Brian Worth, Rhonda Bentz and Vincent Curatola, 901 7th Street NW, 2nd Floor, Washington, D.C. 20001.

On August 1, 2008, Brian Melendez filed a Complaint with the Office of Administrative Hearings alleging the Respondents violated Minnesota Statutes § 211B.06 by preparing and disseminating false campaign material. After reviewing the Complaint and attached documents, the undersigned Administrative Law Judge has determined that the Complaint sets forth a prima facie violation of § 211B.06 with respect to Mike Murphy, Brian Worth and the Coalition for a Democratic Workplace, but fails to set forth a prima facie violation of § 211B.06 with respect to Rhonda Bentz, Noah Rouen, and Vincent Curatola. The Complaint is dismissed as to these three individual Respondents.

THEREFORE, IT IS ORDERED AND NOTICE IS GIVEN that this matter is scheduled for a probable cause hearing to be held by telephone before the undersigned Administrative Law Judge at **1:00 p.m. on Friday, August 8, 2008**. The hearing will be held by call-in telephone conference. You must call: **1-888-790-3518** at that time. Follow the directions and enter the code **"19824"** when asked for the meeting number. The probable cause hearing will be conducted pursuant to Minn. Stat. § 211B.34. Information about the probable cause proceedings and copies of state statutes may be found online at www.oah.state.mn.us and www.revisor.leg.state.mn.us.

At the probable cause hearing all parties have the right to be represented by legal counsel, by themselves, or by a person of their choice if not otherwise

prohibited as the unauthorized practice of law. In addition, the parties have the right to submit evidence, affidavits, documentation and argument for consideration by the Administrative Law Judge. Parties should provide to the Administrative Law Judge all evidence bearing on the case, with copies to the opposing party, before the telephone conference takes place. Documents may be faxed to Judge Neilson at 651-361-7936.

At the conclusion of the probable cause hearing, the Administrative Law Judge will either: (1) dismiss the complaint based on a determination that the complaint is frivolous, or that there is no probable cause to believe that the violation of law alleged in the complaint has occurred; or (2) determine that there is probable cause to believe that the violation of law alleged in the complaint has occurred and refer the case to the Chief Administrative Law Judge for the scheduling of an evidentiary hearing. Evidentiary hearings are conducted pursuant to Minn. Stat. § 211B.35. If the Administrative Law Judge dismisses the complaint, the complainant has the right to seek reconsideration of the decision on the record by the Chief Administrative Law Judge pursuant to Minn. Stat. § 211B.34, subd. 3.

A failure by a Respondent to participate and appear by telephone at this probable cause hearing may result in a finding that the Respondent is in default, that the Complainant's allegations contained in the Complaint may be accepted as true, and that the Presiding Administrative Law Judge may dispose of the Complaint according to Minn. Stat. § 211B.35, subd. 2.

Any party who needs an accommodation for a disability in order to participate in this hearing process may request one. Examples of reasonable accommodations include wheelchair accessibility, an interpreter, or Braille or large-print materials. If any party requires an interpreter, the Administrative Law Judge must be promptly notified. To arrange an accommodation, contact the Office of Administrative Hearings at PO Box 64620, St. Paul, MN 55164, or call 651-361-7900 or 651-361-7878 (TDD).

Dated: August 6, 2008

/s/ Barbara L. Neilson

BARBARA L. NEILSON
Administrative Law Judge
651-361-7845

MEMORANDUM

The Complaint concerns the 2008 Minnesota U.S. Senate race. The Complaint alleges that a television ad developed by Respondent Mike Murphy on behalf of the Coalition for a Democratic Workplace contains false campaign material with respect to candidate Al Franken. The ad is directed at Mr. Franken's support of proposed federal legislation known as the Employee Free Choice Act (EFCA). The Complaint contends that two statements in the television ad are false. The statements are: "Franken says eliminate the secret ballot for workers," and "Tell [Franken] he's wrong to end worker privacy." The Complaint maintains that these statements are false because Franken has never said he wants to eliminate the secret ballot for workers or end worker privacy. In addition, the Complaint asserts that the ad intentionally misrepresents the EFCA and Mr. Franken's support of it. According to the Complaint, the EFCA does not eliminate the right to a secret ballot. Rather, it provides a process for "streamlining union certification" without amending the secret ballot provision. According to the Complaint, the secret ballot would remain intact if EFCA is enacted into law. Therefore, the Complaint claims that the statements in the ad that Al Franken (by supporting the EFCA) wants to eliminate the secret ballot for workers and end worker privacy are false, and that the Respondents knew the statements were false or communicated them with reckless disregard of whether they were false.

Minn. Stat. § 211B.06, subd. 1, prohibits intentional participation:

... [i]n the preparation, dissemination, or broadcast of paid political advertising or campaign material with respect to the personal or political character or acts of a candidate, or with respect to the effect of a ballot question, that is designed or tends to elect, injure, promote, or defeat a candidate for nomination or election to a public office or to promote or defeat a ballot question, that is false, and that the person knows is false or communicates to others with reckless disregard of whether it is false.

In order to be found to have violated this section, a person must intentionally participate in the preparation, dissemination or broadcast of false campaign material that the person knows is false or communicates with reckless disregard of whether it is false.

The term "reckless disregard" was added to the statute in 1998 to expressly incorporate the "actual malice" standard from *New York Times v. Sullivan*.¹ Based on this standard, the Complainant has the burden at the hearing to show by clear and convincing evidence that the Respondents prepared or disseminated the advertisement knowing that it was false or did so with reckless disregard for its truth or falsity. The test is subjective; the Complainant must come forward with sufficient evidence to prove the

¹ *New York Times v. Sullivan*, 376 U.S. 254, 279-80 (1964).

Respondents “in fact entertained serious doubts” as to the truth of the ad or acted “with a high degree of awareness” of its probable falsity.²

For purposes of a prima facie determination, the Complainant must detail the factual basis to support a claim that the violation of law has occurred.³ “Prima facie” means “[s]ufficient to establish a fact or raise a presumption unless disproved or rebutted.”⁴ “Prima facie evidence” is “[e]vidence that will establish a fact or sustain a judgment unless contradictory evidence is produced.”⁵ In determining whether a campaign complaint sets forth a prima facie violation of the statute, the Administrative Law Judge is required to credit as true all of the facts that are alleged in the Complaint, provided that those facts are not patently false or inherently incredible.

The Complainant initially filed a complaint alleging this violation on July 24, 2008. By Order dated July 29, 2008, that complaint was dismissed without prejudice because it failed to allege why the statements at issue are factually false, and it failed to identify the individual Respondents or allege any facts to support an allegation that they participated in the preparation or broadcast of the television ad at issue. The Complainant filed this revised Complaint on August 1, 2008. The Complaint names five individual Respondents in addition to the Coalition for a Democratic Workplace.

After reviewing the Complaint and its attachments, the Administrative Law Judge concludes that the Complaint sufficiently alleges that the identified statements are false and that the federal bill at issue does not eliminate workers’ rights to a private ballot vote. The Complaint further sufficiently alleges that Respondents Mike Murphy, Brian Worth and the Coalition for a Democratic Workplace participated in the design and dissemination of the advertisement knowing the statements were false or with reckless disregard as to whether the statements were false. The Complaint attaches a press release issued by the Coalition for a Democratic Workplace that identifies Mike Murphy as the person who developed the ad. The press release further identifies Brian Worth as a spokesperson for the Coalition, and quotes him as saying that the Coalition will continue to provide information to Minnesotans about the candidates because “Minnesotans need to know that workers could effectively lose their right to cast a private ballot in a union election.” The Administrative Law Judge concludes that the Complaint alleges a prima facie violation of Minn. Stat. § 211B.06 as against these Respondents and this matter will proceed to a probable cause hearing.

The Administrative Law Judge further concludes, however, that the Complaint fails to allege any facts to support an allegation that Respondents Rhonda Bentz or Noah Rouen intentionally participated in the preparation or dissemination of the alleged false campaign material. Although the Complaint identifies Ms. Bentz and Mr. Rouen, and provides a brief resume for each, it does

² *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968); *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964). See also *Riley v. Jankowski*, 713 N.W. 2d 379 (Minn. App.) review denied (Minn. 2006).

³ Minn. Stat. § 211B.32, subd. 3.

⁴ *Black’s Law Dictionary* 1228 (8th ed. 2004).

⁵ *Id.* at 598.

not allege any facts to support a claim that they participated in the preparation or dissemination of the ad. The Complaint states only that Ms. Bentz is employed by a Republican media-relations firm called Navigators and that she has in the past worked in some capacity on behalf of Senators Norm Coleman and John McCain. Likewise, the Complaint states that Noah Rouen is the vice president of a public relations firm and has coordinated media programs for several clients. According to the Complaint, Mr. Rouen spent two years as a staff member for former Senator Rod Grams and is currently a delegate to the 2008 Republican National Convention.

Both Ms. Bentz and Mr. Rouen are identified as contact persons for the Coalition for a Democratic Workplace on the press release attached to the Complaint. However, their identity as contact persons for the Coalition, without more, is insufficient to support a prima facie violation of Minn. Stat. § 211B.06. The Complaint has not alleged that either Ms. Bentz or Mr. Rouen participated in the preparation or broadcast of the ad. The Complaint as against Ms. Bentz and Mr. Rouen is dismissed.

Finally, the Complaint alleges that by acting in the television ad, Vincent Curatola participated in the preparation and broadcast of the false campaign material. The Complaint further alleges that because Mr. Curatola is a member of the American Federation of Television & Radio Actors and/or the Screen Actors Guild Union, he knew or entertained serious doubts about the truthfulness of the statements he made in the advertisement.

Mr. Curatola is an actor who is widely recognized for a role he played in the HBO series "The Sopranos." According to the Coalition's press release, he was hired because his character is "easily identifiable to viewers." The mere fact that Mr. Curatola read the lines of the script and may belong to an actors' union is not enough to support an allegation that he intentionally participated in the preparation of false campaign material that he knew was false or entertained serious doubts as to its truthfulness. The Complaint against Mr. Curatola is dismissed.

B.L.N.